STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH K. LASLEY,

Plaintiff-Appellant,

v

MICHAEL JAMES MILLER,

Defendant-Appellee.

UNPUBLISHED
November 3, 2011

No. 303060
Saginaw Circuit Court
LC No. 08-000912-DP

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order transferring sole legal and physical custody of the parties' minor child from plaintiff to defendant. Because we conclude that there was not clear and convincing evidence supporting a change of custody, we reverse and remand for additional proceedings consistent with this opinion.

I. FACTS

The parties, who never married, are the parents of a daughter born in October 2005. Plaintiff has been the minor child's primary caregiver throughout her life. Defendant had, and sought, no contact with the child until she was three years old and paid no support during that time. In October 2008, based on a stipulation of the parties, the trial court entered a Judgment of Filiation declaring that defendant was the child's biological father and granting sole physical and legal custody to plaintiff with graduated parenting time for defendant.

Plaintiff denied defendant his parenting time on several occasions from December 2008 through March 2009, which led defendant to file motions seeking to hold plaintiff in contempt. The trial court held plaintiff in contempt, fined her $750, and ordered her to attend the SMILE[1] program. The court then referred the matter to custody specialist Jill Hogenson for a custody recommendation.

[1] SMILE, which stands for "Start Making It Liveable For Everyone," is a seminar for divorcing parents.

Hogenson produced a recommendation based on the statutory best interest factors in MCL 722.23.[2] Hogenson found plaintiff either at an advantage or equal with defendant on all factors. In particular, she found that plaintiff had a stronger emotional bond with the child because defendant had been absent for most of the child's life. She noted that plaintiff was employed while defendant was not, and that defendant had a history of bouncing from relationship to relationship. The child attended daycare and appeared to be developing normally. Hogenson determined that plaintiff should retain "custody" of the child. The report and subsequent order based thereon did not specify that plaintiff retained sole legal custody, although it implied it. Nevertheless, it explicitly granted defendant "the authority to pursue information about the minor child's medical and/or academic issues" and ordered plaintiff to "keep defendant informed concerning the child's physicians, school(s) and teachers."

A mere three weeks later, defendant filed a petition seeking additional parenting time and requesting that plaintiff be required to remove the child from daycare and, instead, allow

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[2] As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

defendant to watch the child because he was currently unemployed. At the hearing, the trial court admonished defendant for filing another petition so soon:

> Mr. Miller, I've looked at all these things and I have to tell you that after I have a custody specialist look at this and then have you come in within three weeks, it really surprises me. This is a pattern that I don't want to see happen. I've seen it through your file. You[r] file's only been opened with me for six months and I've got a huge file already. You have to learn to communicate and so does [plaintiff] with you. I don't have any pattern that this is going to continue with you as a parent yet.
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> I've got—you've got standard parenting time, which is what we normally give if we can feel that people need parenting time, and you've for standard parenting time. It's good to see that you've stepped up to the plate, that you want to be a dad, but there needs to be some time passing here to make sure things are going to work.
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> All of a sudden just to come back and, for instance, this licensed day care and parenting time, I just started this file with you in December of '08. I just got the report from Miss Hogenson and signed it three week—three weeks ago and then I get another motion to change all kinds of things. I don't think that's a good thing to do yet. I think there needs to be a pattern set. I need to see a year go by and see what's gone on.
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> So you got 15 [more] years where you have to go through me to deal with this child, and I don't want to see this file be 15 times this or 30 times this size already. That's not what you need.
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> So if you're still having problems in another six months to a year, come back and maybe I'll consider after you get your winter schedule and see what you're doing about employment, but I'm hoping over the next six months you guys can take it to another level and talk.

The trial court's order reiterated that defendant was to receive standard parenting time and that "[i]f Plaintiff and Defendant can not reach an agreement [as to mid week visitations] then the parties will follow the standard schedule until further order of the Court." The order also permitted defendant to have his mother or fiancée pick up the child if he was unable to do so himself.

Six months later, in February 2010, defendant filed a motion to modify custody and parenting time. Defendant's petition included further allegations of parenting time violations, including that plaintiff changed the child's daycare and would not inform defendant where the new daycare was. According to the record, this change was precipitated when defendant began

showing up at the child's daycare and removing her from the premises for lunch, even though it was not his scheduled parenting time. Plaintiff was concerned that the daycare permitted defendant to take the child when it was not his scheduled time and moved her to another daycare. Once plaintiff informed defendant of the new daycare, he began to show up there demanding that the daycare release the child to him for lunch. Defendant then sent an email to the daycare provider "insinuat[ing] that [she] was in violation [of a State licensing rule] by not releasing his daughter to him." Defendant apparently became rather belligerent with the daycare provider during several telephone calls as they discussed that the paperwork they had received indicated that defendant had time with the child on Wednesdays from 5 to 8 p.m. and every other weekend from 6:00 p.m. on Friday through 6:00 p.m. on Sunday. Defendant became angry and told the provider she was denying him his right to see his daughter. The provider told him that if their paperwork was incorrect, he should send something that said otherwise, but they had to go by what they had. The daycare provider then sent a letter to the Friend of the Court attaching defendant's letter and indicating that she requested defendant not come to the daycare to pick the child up until he could provide documentation that he was permitted to do so and requesting official documentation from the courts as to what she should do.

The trial court held a hearing and found the plaintiff was not in contempt and explicitly set forth defendant's parenting time. The trial court also ordered a trial on "legal custody and parenting time." This trial was set for April 29, 2010.

The parties apparently appeared before the trial court on that date, but there is no record of a hearing. A June 16, 2010 order directs that parenting time drop-off/pick-up be moved to a McDonald's restaurant, established a new parenting time schedule for the summer (although that schedule was not placed in the order), and referred both parties to masters degree psychologist Anne Clynick for evaluations and counseling.

Less than three months later, defendant moved to force plaintiff to enroll the child in school—either kindergarten or "young fives"—at the elementary school assigned to defendant's home. Apparently during that time plaintiff had lost her job and had elected to care for the four-year-old at home and indicated that she wanted to wait and enroll the child in kindergarten at the elementary school assigned to her home the following year when the child was six years old, which was permissible based on the child's October birthday. On September 20, 2010, the trial court held a hearing on the issue. The trial court ultimately denied the motion because "plaintiff mother has sole legal and physical custody, therefore, she has the right to make that decision." However, the trial court went on to add that if it was "brought to the Court that there's been some delay in the child's education, then the Court will look at that." The trial court also noted

> I don't know why the legal issue of custody was not decided in April; the order didn't mention anything about it when it was set up so the Court will, instead of referring this out, it will set a trial and I'll make all the determinations on that day as to legal custody. Since legal and physical custody, if that's what's in question but it was only legal custody as I understood it that was asked for, so I'll make a decision as to legal custody. Parenting time has already been made. I'll set a trial date up.

By October 13, 2010, defendant had filed another motion regarding parenting time exchanges. After a hearing, the trial court required the parties to hold exchanges of the child at Safe Place because of their inability to get along.

On November 16, 2010, defendant filed what he labeled an "amended" motion seeking to modify custody and parenting time. During the December 6, 2010 hearing, plaintiff alleged that defendant and his wife took the child and get her hair cut while they had her for Thanksgiving, even though the child had been growing it out for Locks of Love. The trial court declined to make any decisions, but granted defendant's motion to hear issues related to physical custody and parenting time during the trial on legal custody that was already set for January 21, 2011.

At trial, Clynick testified that plaintiff wanted defendant to have a relationship with their daughter, but that plaintiff wanted to control the extent of that relationship. Clynick noted, however, that both parties had control and power issues. Neither party could say something nice about the other. The parties failed to "discuss how to work out a specific parenting situation. . . . The discussion still revolves around who owns this child how much of the time." Defendant told plaintiff on more than one occasion, while Cynick was present, that he wished plaintiff were dead and then laughed. When Cynick would immediately address the comments and say "I'm sure you don't mean that. And he said, yes, I do." Cynick testified that defendant took pleasure in baiting plaintiff. She noted that defendant became "reactive when things don't go his way" and described him as "rigid, inflexible, stereotypical masculine [and] competitive." She noted that he can be "verbally aggressive, overly emotional, reactive" and that "his primary issue right now is having his daughter more frequently. That is his goal."

Clynick saw no evidence that plaintiff was alienating the child from her father. The child was not hesitant to see either parent individually, but she did not want them in the same room because she was afraid they would fight. Clynick was principally concerned about the parents' lack of communication with each other, rather than any direct influence aimed at the child. Clynick did think that plaintiff had spoken to her daughter about the case. She also thought that a certain amount of the tension between the parties might be resolved by arranging parenting exchanges so that the parties would not be in the same room with each other.

As previously noted, plaintiff lost her job during the period between Hogenson's evaluation and the custody trial[3] and so decided to care for her daughter at home in order to spend more time with her. Clynick testified that the child could count to ten and could sing her ABCs, though she mixed up some letters.

[3] The trial court found that, "[a]ccording to the psychologist, she lost her job because of decreased productivity in the job because of the conflict she had in the custody matter." Clynick did not, however, testify to this at trial and the trial court stated that it was relying only on Clynick's testimony and not on her written psychological evaluations of the parties. Plaintiff testified herself, however, that she was laid off "[d]ue to unproductivity" because she "was out a lot due to court and because" she had to keep taking time off from work to deal with defendant's actions.

At the close of trial, the court reiterated its finding that proper cause or change of circumstances existed allowing modification of the original custody order. The court found that an established custodial environment existed with plaintiff, but that clear and convincing evidence militated in favor of granting sole legal and physical custody to defendant with parenting time for plaintiff. Plaintiff filed a motion for reconsideration which was denied.

II. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Plaintiff first argues that the trial court should not have even considered a change in custody because there was no showing of proper cause or change in circumstances. We disagree.

A custody order may only be modified "for proper cause shown or because of change of circumstances." MCL 722.27(1)(c). "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). We defer to the trial court's finding unless the evidence "clearly preponderate[s] in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994).

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors.
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> [I]n order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 512-514; 675 NW2d 847 (2003) (emphasis in original).]

A court need not always hold an evidentiary hearing prior to determining the existence of proper cause. *Id.* at 512. The court may base the determination on undisputed facts, or it may "accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard." *Id.*

The trial court originally ordered a custody hearing after hearing defendant's third motion to hold plaintiff in contempt for various violations. The court did not explain at that time what change of circumstances or proper cause existed to justify the hearing. However, the court provided a brief explanation at the outset of the custody hearing and a more thorough explanation with its ruling from the bench at the close of the hearing. The court's principal concern appeared to be the growing conflict between the parties, reflected in the fact that the court had to issue a personal protection order requiring parenting exchanges take place first at a McDonald's and later at Safe Place. The court also considered that plaintiff lost her job and removed her daughter from a daycare with which plaintiff had been happy, not telling defendant where the child would be attending daycare, and coaching the child prior to counseling. The court also noted that defendant's home life had become more stable. The court emphasized that the fact that the parties could no longer agree on parenting time was causing a great deal of instability in the child's life. The court found that these were not normal life changes, and were likely to have a significant effect on the child's life.

These facts are essentially undisputed. The parties' relationship had utterly deteriorated prior to the custody hearing.[4] Plaintiff lost her job prior to the hearing. It addition, plaintiff altered her daughter's daycare situation more than once, although the parties do not agree on her reasons for doing so.

The fact that plaintiff lost her job, standing alone, would not support a finding of changed circumstances, because changes of economic circumstances are best addressed by revisiting child support rather than custody. *Corporan*, 282 Mich App at 607. However, the collapse of the parties' ability to cooperate with each other constituted a change that is not a normal life change and which could seriously impact the minor child's well being. The evidence does not clearly preponderate against the trial court's finding of a change of circumstances, whether viewed based on the record before the custody hearing or including that hearing.

Plaintiff argues that the trial court's findings are not valid because they were not fully stated until the close of the custody hearing. However, the court's core reason for holding a custody hearing was the constant bickering between the parties and the court stated this at the outset of the custody hearing, before hearing any evidence on the best interest factors. In addition, the court articulated this ground at an earlier hearing, albeit indirectly. The court clearly indicated that it was aware of the requirement for a change of circumstances or proper cause, and there is sufficient support for the conclusion reached by the court.

III. BEST INTERESTS OF THE CHILD

[4] Plaintiff argues that the trial court erred by concluding that it was required to grant sole custody to one party. There is no factual support for this argument. The court stated that it considered joint custody, but thought sole custody was appropriate given the parties' inability to agree on anything.

Plaintiff next argues that no clear and convincing evidence supported a transfer of sole legal and physical custody to defendant. We agree.

We must affirm a custody order "unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The parties agree that the child had an established custodial environment with plaintiff. Therefore, the trial court could not change custody absent clear and convincing evidence that the change would be in the child's best interests. MCL 722.27(1)(c). "The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009). "[T]he trial court is in the best position to determine the credibility of witnesses." *Berger*, 277 Mich App at 708. The trial court stated its factual findings in a thorough, structured manner.

The trial court found the parties equal under factor A, the emotional ties between the parties and the child. The court took into account the fact that defendant was absent for the child's first three years, but found that defendant had made a concerted effort to develop their relationship. Plaintiff argues that defendant could not be found equal because of his extended absence, but there was testimony that defendant cares deeply for his daughter and made substantial efforts to build a relationship with her. The trial court's finding was not against the great weight of the evidence.

The court found that factor B favored defendant because he would better provide for the child's education. This was apparently based on Clynick's testimony that the child could not yet recite her ABCs without mixing up a few letters and that, in her opinion, ABCs should be "pretty much flawless at that age." Defendant testified that he would send the child to school during the 2010-2011 school year. However, plaintiff testified that she planned to send the child to public school at age 5, i.e., the following school year, and that she was capable of teaching the child everything necessary at her age and that she was providing opportunities for her to socialize at church and in the neighborhood. There was no evidence that the child had difficulty socializing with other children. In addition, while defendant expressed concern about the child's education, there was substantial evidence that defendant exhibited poor and sometimes hostile behavior with the child's daycare providers, and defendant's concern with the propriety of home care was suspect. He had previously advocated that he should be permitted to provide home care for the child when he was out of work rather than having her go to day care. His new position that the child would be harmed unless she immediately started school or daycare, coming only after plaintiff exercised her right to care for the child at home, was, at best, inconsistent and, more likely, another example of his refusal to accept any decision plaintiff made despite her status as legal custodian. Consequently, this factor favored neither parent and the trial court's conclusion that it favored defendant was against the great weight of the evidence.

The trial court found the parties equal under factor E.[5] Plaintiff points to defendant's history of inability to sustain relationships. However, defendant has been married since 2009, and there was no evidence that his current relationship was unstable. The trial court's finding was not against the great weight of the evidence.

The court also found the parties of equal moral fitness under factor F. Plaintiff notes that defendant removed the child from daycare on several occasions without authorization and did not support her for three years. Further, he stated in front of Clynick that he wished plaintiff were dead, and insisted that he was serious when Clynick suggested that he was not. Plaintiff also points to an incident where defendant drank alcohol while the child was with him. However, someone else drove defendant home on that occasion, suggesting that there were sober adults available to help supervise the child. The court also noted allegations against plaintiff's moral fitness; the record reveals that she denied defendant visitation in several instances. The evidence established that neither party could claim moral perfection. The trial court's finding is not against the great weight of the evidence.

Plaintiff next argues that the court should have favored her under factor G because defendant suffers from arthritis and has had surgeries on his shoulders and feet. However, defendant testified that he can still keep up with his daughter. Plaintiff points to prior testimony by defendant to impeach this claim, but the trial court had the authority to weigh the veracity of defendant's testimony. This finding is not against the great weight of the evidence.

The trial court found that factor H favored defendant because the child was not receiving adequate socialization or education. As noted in our discussion of factor B, we find little if any support in the record for this conclusion. There was no evidence that the child was having problems at home or in the community. The psychologist's testimony that in her opinion a four year old child should be able to recite the alphabet "pretty flawlessly" and that this child mixed up a few letters is far from a basis to conclude that her education was being ignored. Similarly, if the trial court concluded that the custody decision came down to which parent would send the child to kindergarten at age 4, we find it unlikely that the mother would have refused to do so and, in any event, the trial court ordered that the child begin pre-school immediately. We conclude, therefore, this factor favored neither parent and the trial court's conclusion that it favored defendant was against the great weight of the evidence.

The trial court also found that factor J favored defendant because there was evidence that plaintiff had coached the child prior to seeing the psychologist. Plaintiff argues no such evidence existed. Clynick never used the term "coached," but when asked whether plaintiff had talked to the child about the court case she testified, "I think she has because I know when a child is sent to deliver a message . . . ." It was not unreasonable for the court to interpret a child being "sent to deliver a message" as coaching. Also, the record contains a few instances where plaintiff denied defendant his parenting time completely and the trial court stated that defendant was more

[5] We have skipped factors C and D because plaintiff did not contest the trial court's findings for those factors.

cooperative than plaintiff. However, based on a review of the record, the trial court erred in concluding that this factor favored defendant. Defendant continually baited plaintiff and created unnecessary problems. He was never satisfied with the parenting time he was awarded and continually harassed plaintiff with motions to change custody and parenting time even after periods as short as three weeks. He failed to understand or recognize plaintiff's authority as the party with sole legal and physical custody. He inappropriately removed his child from daycare when he was not so authorized and harassed the daycare providers when they enforced court orders and denied him the ability. If defendant disagreed with a decision plaintiff made, even if that decision was something within plaintiff's sole authority—such as where the child attended daycare—he would simply file another motion in court to get things changed. He was even inconsistent in his arguments before the trial court. As previously noted in factor B, defendant originally argued that because he was unemployed, the child should be removed from daycare and he be allowed to school the child. However, when plaintiff was laid off and elected to make the same choice, he took her back into court to try and have her ordered to place the child in school; and not just into any school, but a school that was geographically convenient for him, as opposed to the one assigned to plaintiff's address. As Clynick testified, defendant's sole goal was to get more time with the child and he did not care how he made that happen.

We note that the trial court bears some responsibility for this. Although the trial court admonished defendant for the frivolous filing of a change in parenting time and custody not three weeks after the initial order was filed, with each subsequent motion, it ceded a little more ground to defendant, undermining plaintiff's ability to hold firm to decisions she made that were supported by the previous orders, and emboldening defendant to fight harder to take more and more ground, inducing more conflict that would provide a basis to return to court yet again. We agree that there was nothing wrong with defendant wanting additional time with his daughter, but his refusal to accept the limits imposed by the custody order was, ultimately, the primary problem in the situation, not plaintiff's firm adherence to the orders. Certainly, if the parties could have been more flexible, that would have been ideal. However, it was clear early on that this would never be the case. Nevertheless, the trial court continued to change the circumstances to require more flexibility, rather than less, which only exacerbated the problem. Defendant should not be rewarded with sole legal and physical custody for creating and exacerbating the issues that resulted in the custody hearing. Ultimately, the record evidence that both parties were determined to "win," and would not discuss parenting issues, but instead fought over who owned the child for how much of the time. This factor favored neither party.

Under factor L, the catch-all factor, the court found that the child had been alienated from society and from her father at times, and again noted that plaintiff coached her before meeting with Clynick. However, there was no evidence to support the court's finding of alienation, as Clynick testified that she did not see evidence of parental alienation. The court also took note of the fact that plaintiff installed cameras outside her house and characterized this action as paranoid. However, plaintiff testified that the cameras were installed by her mother (plaintiff lives in her mother's house) after two incidents of substantiated vandalism and Clynick's psychological evaluation of plaintiff indicated that there was no evidence of paranoia. It is clear from the record that all of plaintiff's picture-taking and text-messaging were attempts to create avenues of documentation and proof. Plaintiff was representing herself and so was attempting to be as specific as possible and provide as much detail and proof as she could. In the 19 months

between the time the June 23, 2009 custody order was filed and the January 21, 2011 custody trial, defendant filed at least six motions to change custody and parenting time—the equivalent of one every three months. Although the trial court described plaintiff as "obsessed," the record reveals that defendant was equally "obsessed" with winning. This factor favors neither party.

In sum, we find that the trial court erred in holding that factors B, H, J, and L favored defendant. Moreover, the principal problem cited by the trial court was the parties' inability to get along, and yet, this concern cannot be addressed by changing custody because parenting exchanges and communication will still be necessary. Rather, as Clynick testified, the court could alleviate the problems by providing a black and white ruling laying out the parties' rights, and having exchanges occur in settings where only one parent is present with the minor child at a time. The court, in fact, implemented Clynick's suggestion.

The evidence of coaching by plaintiff is worrisome, but also worrisome is the fact that defendant cannot refrain from baiting plaintiff even in front of the court appointed psychologist, who he knew would be making a report to the court. The record is also clear that defendant continued to fight plaintiff about decisions that were clearly within her authority. In addition, the court ordered that the child be enrolled in pre-school immediately, which would have resolved the schooling issue if plaintiff retained custody. The only problem addressed by a change of custody is plaintiff's coaching of the child and Clynick's testimony was unequivocal that plaintiff was not alienating the child from defendant. All of the changes ordered by the court could have been implemented with the same result if plaintiff maintained custody.

We reverse the trial court's findings as to factors B, H, J, and L and remand for the trial court to redetermine custody and for other proceedings consistent with this opinion. On remand, the trial court should consider up-to-date information, including the child's preference if applicable and the child's living arrangements during this appeal. The trial court may conduct a new evidentiary hearing if it believes this is necessary. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray